APPEAL NO. 021345
FILED JULY 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Following a contested case hearing held on May 1, 2002. The hearing officer found that "the certification of the second designated doctor, Dr. P, is not contrary to the great weight of the other medical evidence" and concluded that the respondent's (claimant) "impairment rating [IR] is 28%." The appellant (carrier) has appealed this determination, contending that although the disputed issue was framed as "[w]hat is the claimant's correct [IR]," the real issue was whether the appointment of Dr. P was "proper"; that the appointment of Dr. P was "inappropriate"; and that the Appeals Panel should reverse the hearing officer's decision that the claimant's IR is 28%. The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that Dr. R, the claimant's treating doctor, assigned to the claimant an IR of 69%; that the first designated doctor, Dr. K, assigned an IR of 13%; and that Dr. P assigned an IR of 28%. The documentary evidence reflects that the Texas Workers' Compensation Commission (Commission) wrote Dr. K on April 24, 2001, asking that he review an attached letter of March 19, 2001, from Dr. E. This letter stated that the claimant had been under his care for lumbar radiculopathy and back spasm; that the 13% IR assigned by Dr. K did not take into account the claimant's reduced range of motion (ROM) from her lumbar fusion from L3 to L5 and her lower left extremity dyesthesia affecting the L4 and L5 nerve roots; and that the claimant needs a more accurate IR. Dr. K's response of May 8, 2001, was a form letter stating that he had retired from his practice of orthopedic surgery and "am therefore unable to comply with your request." Apparently, upon receipt of this response the Commission appointed Dr. P as a second designated doctor; he examined the claimant and assigned the 28% IR; and the hearing officer adopted his report. The carrier introduced a letter from Dr. K to its attorney dated November 30, 2001, in which Dr. K discussed his evaluation and Dr. E's report and saw no reason to change the IR he assigned.

The carrier contended at the hearing that the disputed issue had a "sub-issue," namely, the propriety of the Commission's appointment of the second designated doctor. The carrier states on appeal that "[w]hile the issue was phrased as what [sic] the correct [IR], resolution of this issue depended on whether the appointment of the second designated doctor was proper." The carrier maintains that the appointment of the second designated doctor was improper because Dr. E's report contains erroneous information, to wit: that Dr. K did not consider ROM, and, thus, that Dr. E's report should not have prompted the request for clarification to Dr. K. We note that nowhere does the record reflect any effort by the carrier to add a disputed issue concerning the propriety of the Commission's appointment of the second designated doctor, pursuant

to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7), nor does the carrier cite any authority for the proposition that this issue was subsumed in the issue of the claimant's correct IR.

It is well settled that the Commission can appoint another designated doctor in circumstances where the first designated doctor cannot or will not complete the process of determining the IR. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 941635, decided January 23, 1995. Section 408.125(e) provides that the report of the designated doctor chosen by the Commission shall have presumptive weight and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. The carrier does not contend that the report of Dr. P is contrary to the great weight of the other evidence but simply argues that Dr. P should not have been appointed. We are satisfied that the challenged determination of the hearing officer is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

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Roy L. Warren
Appeals Judge